

The Honorable Ricardo S. Martinez

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

KENNETH FLEMING, JOHN DOE, R.K., and
T.D.,

Plaintiffs,

v.

THE CORPORATION OF THE PRESIDENT
OF THE CHURCH OF JESUS CHRIST OF
LATTER-DAY SAINTS, a Utah corporation
sole, a/d/a "MORMON CHURCH"; LDS
SOCIAL SERVICES a/d/a LDS, a Utah
corporation,

Defendants.

NO. 04-2338 RSM

DEFENDANT'S MOTION TO AMEND
ANSWER TO ADD AT-FAULT
ENTITY

NOTE ON MOTION CALENDAR:
JULY 26, 2006

I. INTRODUCTION

Defendant The Corporation of the President of the Church of Jesus Christ of Latter-Day Saints ("COP") hereby moves to amend the affirmative defense in its Answer to add Plaintiff's father, Jerry Kelly, as another person at-fault. COP's answer already identifies several non-parties that were at fault, including Plaintiff's mother, Dorothy Kelly, Dr. Herman Allenbach and Jack LoHolt. The same events that give rise to a potential allocation of fault to Mrs. Kelly also give rise to a potential allocation to Mr. Kelly.

DEFENDANT'S MOTION TO AMEND ANSWER TO ADD AT-
FAULT ENTITY - 1
No. 04-2338 RSM

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1 As a negligence case in this Court based upon diversity jurisdiction, the Court will apply
 2
 3 the substantive tort law of Washington State. Under Chapter 4.22 RCW, if the jury finds COP
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 5 liable, the jury will determine whether non-parties were negligent, and whether such negligence
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 7 approximately caused Plaintiff's harm, if any. If the jury finds such non-parties at fault, the jury
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 9 must then determine the proportionate share of fault to be borne by such persons and the
 10
 11 Defendant, with the total of such shares equaling 100 percent.

12
 13 This amendment will not prejudice Plaintiff—the evidence supporting the amendment is
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 15 already in the record and no further discovery will be needed. This amendment also will not
 16
 17 change the proof offered at trial. The only change brought by this motion, if granted, is that
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 19 Jerry Kelly would be added to the jury verdict form as another person to whom the jury could
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 21 assign fault. Under these circumstances, the Court should exercise its discretion to permit COP's
 22
 23 amendment.¹

24 25 II. FACTS

26 27 A. Plaintiff's Claim Against COP is Based Upon COP's not Reporting LoHolt to the 28 Police.

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 30 Plaintiff's abuser, Jack LoHolt, lived within the Kent 2nd Second Ward of the Church.
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 32 He lived at the home of Dr. Herman Allenbach, from whom he rented a room and did handyman
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 34 services. Plaintiff lived next door.

35
 36 In February 1972, Richard Pettit, a member of the Church in the Kent 2nd Ward, had a
 37
 38 confidential discussion with the Bishop of the Ward, Bishop Randall Borland, in which Mr.
 39
 40 Pettit stated that LoHolt had touched his son inappropriately on a Boy Scout trip. Both Mr. Pettit
 41
 42 and Bishop Borland considered this conversation confidential. Plaintiff alleges that Bishop
 43
 44

45 ¹ Although not required by the local rules, COP's counsel conferred with Plaintiff's counsel in an effort to avoid the necessity of filing this motion. Plaintiff's counsel would not consent to the requested amendment.

1 Borland, and hence COP, was negligent for not reporting LoHolt to the police. COP denies it
2
3 was negligent and contends that, in any event, it cannot be held liable because the abuse
4
5 preceded February 1972, prior to and thus the time the Church had knowledge of any sexual
6
7 abuse by LoHolt.
8

9 **B. Plaintiff Testified Both His Parents Knew of the Abuse and Did Not Report LoHolt**
10 **to the Police.**
11

12 Plaintiff himself testified that he told both his mother and father of an incident in which
13
14 LoHolt masturbated in the presence of Plaintiff and other boys. Mr. and Mrs. Kelly told Dr.
15
16 Allenbach, their neighbor and LoHolt's landlord, but did not inform the police.
17

18 As Plaintiff testified:
19

20 Q. The incident in the field, according to what your
21 description is, was much less intrusive or severe than the
22 other instances that followed in the basement of the
23 apartment; isn't that correct?
24

25 A. That's correct.
26

27 Q. After the incident which occurred in the field, you went and
28 told your mother; is that correct?
29

30 A. That's correct.
31

32 Q. Did you also tell your father?
33

34 A. We were sitting at the dinner table in—well actually we
35 told—after the abuse in the field where Jack masturbated in
36 front of us, we ran down to tell my mom, and then my dad
37 came home from work, and then we all sat down for dinner,
38 and then my mom brought it up that—you know, and then
39 they started asking us questions about, well, what
40 happened, and how long this has been going on, and then
41 they went over and my mother and father met with Dr.
42 Allenbach and Mrs. Allenbach that night.
43
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1 Deposition of Robert Kelly 22:17-23:9.² Plaintiff's parents did not report the matter to the
 2
 3 police. *Id.* at 53:20-21, 55:3-6; Deposition of Dorothy Kelly at 34:6 ("You didn't go to police
 4
 5 with things like that in those days.")
 6

7 Hence, Plaintiff's own testimony shows his father and mother both knew of an early
 8
 9 instance of abuse, reported it to their neighbor Dr. Allenbach, but otherwise did nothing further
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 11 to inform law enforcement. In regard to the jury's decision whether to allocate fault to non-
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 13 parties, Plaintiff's parents are identically situated.
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15 III. ARGUMENT

16 A. Leave to Amend Is Freely Given

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 18 The Ninth Circuit has stated that the policy favoring adjudication on the merits, and thus
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 20 favoring the granting of motions to amend, is applied with "extreme liberality."
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22
 23 Generally, Rule 15 advises the Court that "leave shall be freely
 24 given when justice so requires." This policy is "to be applied with
 25 extreme liberality." In *Foman v. Davis*, 371 US 178, 9 L. Ed. 2d
 26 222, 83 S. Ct. 227 (1962), the Supreme Court offered the following
 27 factors a district court should consider in deciding whether to grant
 28 leave to amend:
 29

30 In the absence of any apparent or declared reason—
 31 such as undue delay, bad faith or dilatory motive on
 32 the part of the movant, repeated failure to cure
 33 deficiencies by amendments previously allowed,
 34 undue prejudice to the opposing party by virtue of
 35 allowance of the amendment, futility of amendment,
 36 etc.—the leave sought should, as the rules require,
 37 be "freely given."
 38

39 Not all the factors merit equal weight. As this Circuit and others
 40 have held, it is the consideration of prejudice to the opposing party
 41 that carries the greatest weight. Absent prejudice, or a strong
 42 showing of any of the remaining *Foman* factors, there exists a
 43 *presumption* under Rule 15(a) in favor of granting leave to amend.
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² Deposition excerpts are attached to the Declaration of Michael Rosenberger filed herewith.

1 *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1051-52 (9th Cir. 2003) (citations
2 omitted; emphasis in original).
3
4

5 **B. The Amendment Will Not Prejudice the Plaintiff, and No Other Factor Supports**
6 **Denial of the Motion.**
7

8 As stated in *Eminence Capital*, the most significant factor in assessing whether to grant
9 leave to amend is whether prejudice to the non-moving party exists. In this case, Plaintiff can
10 assert no prejudice as a result of this amendment. The lack of prejudice is demonstrated by
11 several factors: (1) one of Plaintiff's parents is already identified as an at-fault entity; (2) the
12 evidence supporting the amendment is already part of the record; (3) no further discovery will be
13 required because of this amendment; and (4) it will not alter the nature or scope of the trial.
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20 In light of these factors, the Court should view with skepticism any claim by Plaintiff that
21 the amendment prejudices him. The Ninth Circuit has noted that "bald assertions of prejudice
22 cannot overcome the strong policy reflected in Rule 15(a) to 'facilitate a proper disposition on
23 the merits.'" *Hurn v. Ret. Fund Trust of the Plumbing, Heating & Piping Indus.*, 648 F.2d 1252,
24 1254 (9th Cir. 1981) (quoting *Conley v. Gibson*, 355 US 41, 48, 78 S.Ct. 99, 2 L. Ed. 2d 80
25 (1957)).
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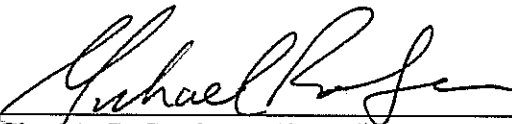
32 Additionally, COP's motion satisfies the other, less-significant *Foman* factors. The
33 motion is not made in bad faith, as is evident from the fact that the Answer has an identical claim
34 regarding Plaintiff's mother. No delay in the litigation will result, since no discovery will be
35 needed. Finally, the amendment is not futile. It is clearly within the jury's prerogative to
36 conclude that both Plaintiff's father and mother breached a duty they owed their son to respond
37 with reasonable care to his disclosure of LoHolt's abuse.
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IV. CONCLUSION

For the reasons stated above, COP respectfully requests leave to amend its Answer to add to its affirmative defenses. Specifically, COP requests leave to name Plaintiff's father, Jerry Kelly, as another at-fault entity.

DATED this 17th day of July, 2006.

GORDON MURRAY TILDEN LLP

By 

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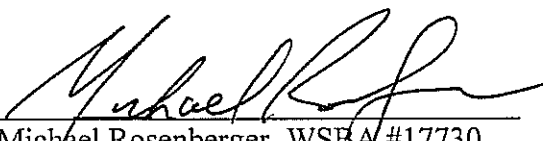
Attorneys for Defendant The Corporation of the
President of the Church of Jesus Christ of
Latter-Day Saints

CERTIFICATE OF SERVICE

I hereby certify that on July 17, 2006, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following. The parties will additionally be served in the manner indicated.

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